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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 62

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellant,

against

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

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IN THE

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OCTOBER TERM, 1968

No. 1120

JACK R. GOLDBERG, Commissioner of Social Services of the City of New York,

Appellant,

against

JOHN KELLY, RUBY SHEAFE, TERESA NEGRON, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellee moves the Court to affirm the judgment sought to be reviewed on the appeal, or, in the alternative, to note probable jurisdiction and set this case down for argument with *Wheeler* v. *Montgomery,* No. 634, O. T. 1968, on the grounds set forth below.

Questions Presented

1. Whether a local welfare department, having found after fulsome investigation an individual or family to be in extraordinary need and in all other respects eligible for public assistance, and having accordingly provided a regular recurring public assistance grant for food, clothing,

shelter, and medical services, may, consistent with procedural due process of law, redetermine eligibility *ex parte* and abruptly withdraw the subsistence grant without affording the individual so affected an adequate and timely opportunity to be heard on the highly controvertible issues underlying the decision to terminate?

2. Whether the hearing requirements of procedural due process of law are satisfied by an opportunity limited to

(1) a request in writing of the case unit making the initial decision to terminate for a review of the case record (an *ex parte* record prepared exclusively by that case unit), and

(2) a submission forthwith in writing of a letter or other "document" showing why the decision to terminate should not be implemented,

in the absence of any effective apprisal of the real reasons for termination, of the evidence and sources of evidence supporting such determination, and in the absence of any opportunity to confront and put questions to those supplying such crucial evidence?

Statement of the Case

Appellees herein are recipients of residual public assistance grants under the federally financed Aid to Dependent Children program, governed by Title IV of the Social Security Act and H. E. W. regulations thereunder, and the State and locally financed Home Relief program, governed exclusively by the New York State Social Services Law.[1]

[1] The United States Department of Health, Education and Welfare, recognizing the gross ineffectiveness and inadequacy of pro-

Both programs provide a semi-weekly recurring grant of money for shelter, clothing and food costs for persons who meet the intricate statutory qualifications and are wholly without resources or another source of support. As a condition of receiving such aid, persons applying must denude themselves at the outset of all resources (save for daily essentials) and must turn over or account for any other income.[2] They are also obliged, under penalties of fraud, to report any changes in circumstances affecting need and eligibility. New York Social Services Law §145.

The Appellees herein were each found after investigation and verification to be without resources and otherwise fully eligible to receive subsistence grants, and regular recurring grants were paid. Some time thereafter their case unit (comprised of a case worker, unit supervisor and case supervisor), based on an *ex parte* investigation, unsolicited reports, and at times apparent hostility, determined them to be no longer eligible for public assistance. Plaintiffs were so notified, with a conclusory and impenetrable statement of the reason, such as excessive resources,

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viding the statutorily mandated trial-type "fair hearing," 42 U. S. C. §602(a)(4), long after aid has been terminated, requires, as of October 1, 1969, that states provide the statutory hearing prior to termination or reduction of aid. *Federal Register*, January 24, 1969, p. 1144. This prospective regulation will require continuation of benefits pending the state "fair hearing" for appellees herein in the ADC category as of October 1, 1969, but will provide no legal protection to appellees in the locally financed Home Relief category. Hence procedural due process of law remains the exclusive source of authority for their claim.

[2] See generally, Note, *Eligibility Determination in Public Assistance*, 115 U. Pa. L. Rev. 1307 (1967). The determination of eligibility under these programs also satisfies the primary condition of eligibility for the federally financed Medical Assistance Program found in Title XIX of the Social Security Act and Regulations thereunder.

failure to cooperate, and the like, and their regular recurring grant for food, shelter and medical treatment was abruptly terminated.

Some of the plaintiffs pursued New York's so-called "fair hearing" before a referee of the State Department of Social Services, which hearing often occurred from thirty to sixty days after request and which hearing provided a determination from thirty to ninety days and even more after the hearing was held. Others of the plaintiffs, with the help of an attorney, attempted to use the so-called written review procedure found in Title 18, N. Y. C. R. R. §351.26(b), contained in Appendix C to the Jurisdictional Statement and the regulation at issue on this appeal. Meanwhile the plaintiffs sought, too often unsuccessfully, to ascertain the reasons informally, to obtain private aid during the dilatory hearing process and, through their attorneys, to stave off evictions, to obtain emergency assistance, to find housing, and generally to ameliorate the drastic consequences of erroneous cut-offs.

They also commenced this suit to compel a timely mechanism of review to subject the controvertible and often unsubstantiated factual surmises underlying the decision to terminate to examination and rebuttal before the impact of erroneous withdrawal of the grant. The state defendant in this action, Commissioner Wyman of the New York State Department of Social Services, thereupon promulgated a regulation, now 18 N. Y. C. R. R. §351.26(a), set forth in Appendix C to the Jurisdictional Statement, requiring an in-person hearing before the local department prior to termination. This procedure was upheld by the court below.

But this procedure was unacceptable to the City of New York, and after ignoring the state regulation for months

while terminations continued apace, the City finally prevailed on the State to permit the radically different procedure contained in §351.26(b), which was found to be invalid below [hereinafter referred to as "option (b)"].

The proofs below, including affidavits on behalf of the Defendant City and State Commissioners required by the Court, establish the following facts:

Under option (b) the client could request his case supervisor to review the case record during the seven-day period before withdrawal, that record being compiled wholly by the members of the case unit including the case supervisor undertaking the review. The recipient was also allowed within a two or three day period to prepare and submit written evidence or documents contesting the decision to terminate in response to a form notice which did not provide any explanation of the reasons for the proposed action and did not disclose the evidence or indeed the factual allegations or surmises underlying the termination. The written notice under option (b) ranged from "failure to attend rehabilitation C. O. C." to "refusal to cooperate with department policy" [3] and often obscurely cloaked the actual reason for termination. The review officer was the case supervisor in the client's case unit, an official shown often to be deeply involved in the case and the particular decision to terminate. Indeed the case supervisor or his superior often initiates the termination.

The statutorily required fair hearing has been conducted in termination cases 20 to 260 days after request,

[3] The latter notice was sent to a recipient almost half a year after the City implemented option (b) and is contained in Appendix D to the Brief *Amici Curiae* of the Columbia Center, et al. in *Wheeler* v. *Montgomery*, No. 634.

and decisions most often have been rendered some 65 to 195 days later. Although federal regulations require that decisions be rendered within 60 days after the request for a fair hearing,[4] the State's 1968 statistics submitted to the court below indicate that only 2 to 8% of the decisions rendered in all cases each month were rendered in sixty days or less, and 39 to 82% were rendered after more than ninety days had passed. No aid was afforded during the hearing process, and only months after this action was commenced (and then only under federal mandate) did New York afford full retroactivity. Figures showing reversals in these hearings revealed an extraordinary margin of error in the initial decision to terminate, at times exceeding one out of three appeals.

Appellees also referred to recent studies demonstrating that many welfare recipients are ashamed to be on welfare and think that their caseworkers do not wish to be questioned or bothered. Education of recipients rarely goes beyond early high school. Most are totally without legal representation and without any skills of written advocacy.

The Court found §351.26(b) in these circumstances an illusory or "cruelly ironic" remedy for meaningful review of the decision to withdraw the public assistance grant on which recipients so desperately depend.

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[4] U. S. Department of Health, Education and Welfare, *Handbook of Public Assistance Administration*, Part IV, Sec. 6200(j). No adequate remedy exists for enforcement of the state or federal timing requirements for statutory hearings. The state rules are directory, not mandatory. *Matter of Duffy* v. *Wyman*, —— M. 2d ——, 297 N. Y. S. 2d 77 (Sup. Ct. 1968), and H. E. W. is for all practical purposes without means of obtaining compliance, save for uncertain and protracted negotiations over a course of years.

ARGUMENT

I.

The regulation found a denial of due process below is plainly invalid under the prior decisions of this Court.

On the narrow question presented by both the decision of the court below and the principal argument New York City tenders to this Court, the decision below is manifestly correct and poses no issue worthy of plenary review in this Court. That question is whether the procedural due process requirement of an adequate and timely hearing for review of a determination to withdraw a grant is satisfied by §351.26(b), drafted and defended only by the City of New York, which allows but an opportunity to request another look at the case record by one involved in the initial decision to terminate, and an opportunity to submit, rather hastily, something in writing in response to a cryptic or conclusory statement of the alleged reason for termination. As the proofs below indicated, the statement, even if penetrable, often has nothing to do with the real reasons for termination, and in no case discloses the actual case against the recipient and the source of the evidence or rumor leading a case worker and his supervisors to believe the recipient is no longer eligible. The real question here is whether in the context of the welfare system such a mechanism is equivalent to a hearing within the intendment of the Fourteenth Amendment.

The answer given below is clear and plainly accords with the prior decisions of this Court that an opportunity to be heard presupposes (1) disclosure of the case against

the individual relied on to justify administrative action and (2) an opportunity to meet that case through the submission of evidence and, equally important, particularly here, an opportunity to put questions to the source of the evidence. As the court below made abundantly clear, we do not speak of the formalities of a judicial trial or indeed the formalities of any proceeding. What is required is only the substance of the right of apprisal of the actual case against an individual contesting a determination made about him, which means revelation of the evidence and its sources, and the right to contest the credibility of those supplying the crucial evidence and to submit one's own evidence before a review officer not involved in the initial decision.

As the court below found, "this is hardly a novel idea." This Court said some time ago, "a hearing in its very essence demands that he who is entitled to it shall have the right to support his allegations by argument however brief and, if need be, by proof, however informal." *Londoner* v. *Denver,* 210 U. S. 373, 386 (1910). Significantly for the instant case, this Court also held then that the plaintiff had the right to be heard "before the tax became irrevocably fixed." 210 U. S. at 385. This right to be heard on the evidence prior to the implementation of an adverse decision has been reaffirmed through the years. *United States* v. *Illinois Central R.R.,* 291 U. S. 457, 463 (1934); *Morgan* v. *United States,* 304 U. S. 1, 18-19 (1937); *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126 (1941); *Kwong Hai Chew* v. *Colding,* 344 U. S. 590, 597 (1953); *Greene* v. *McElroy,* 360 U. S. 474 (1959); *Armstrong* v. *Manzo,* 380 U. S. 545, 552 (1965). To be sure, hearings subsequent to administrative determinations have been permitted under certain emergency conditions (see, e.g., *North American*

Cold Storage Co. v. *Chicago,* 211 U. S. 306 (1906)). But there plainly are no compelling interests here to invoke this exception. The minimal pecuniary interest of the State is insignificant compared to the plight of plaintiffs, deprived for months of their only source of subsistence. The subsequent fair hearing, no matter how thorough, cannot remedy or ameliorate the irremediable harms of erroneous decisions to terminate assistance.[8]

The City procedure represents to our knowledge the only wholly written review process known to administrative law, and it does so in the welfare context in which it is truly and "cruelly ironic." Characteristics of welfare administration generally and of recipients reveals the illusory, if not to say sham, nature of New York City's response to this lawsuit.

The structure and operation of the welfare system maximizes the danger of erroneous and arbitrary administrative action. Public assistance is a highly complex administrative program, involving a federal statute and HEW regulations (some published in the Federal Register, others in the Handbook of Public Assistance Administration, and others in "State Letters"), state statutes, state board rules, and state and local regulations. At the same time standards

[8] The right of a welfare recipient to a hearing prior to termination is being recognized by a growing number of state courts faced by the problem for the first time. *McCullough* v. *Terzian,* No. 379011 (Super. Ct., Alameda County, May 12, 1968) (state-wide injunction); *Moore* v. *Houston,* No. 104435 (Cir. Ct., Wayne Co., Mich. Nov. 1, 1968) (state-wide consent decree); *Camerena* v. *Department of Public Welfare,* 449 P. 2d 957 (Ariz. Ct. App. 1969); *Bible* v. *Smith,* No. 706,263 (Super. Ct., King Co., Wash., March 21, 1969) (declaration of unconstitutionality and injunction for named plaintiffs). See also Note, *Withdrawal of Public Welfare: The Right to a Prior Hearing,* 76 Yale L. J. 1235 (1967); Morris, *Welfare Benefits as Property: Requiring a Prior Hearing,* 20 Admin. L. Rev. 487 (1968).

and procedures are frequently vague or in conflict on crucial questions affecting recipients, leaving the answers to individual caseworker discretion or interpretation.

The pervasive requirements in these programs for establishing and re-establishing need, detailed and severe income and resource restrictions, broad requirements of disclosure, and extensive behavioral and moral constraints, all open up an extremely broad range of inquiry and entail persistent investigation of recipients. Recipients, often illiterate and inarticulate and generally without access to legal assistance, are persons involved in a very unequal relationship with a caseworker and agency possessing enormous discretionary power, ranging from authorization of special grants for clothing and special diets to termination of the entire regular grant. Cooperation, information and response are often assumed as a matter of right by the caseworker, whose demands are backed up by the power to terminate. The welfare system must also acknowledge excessive caseload handled by an inadequate, overworked and insufficiently trained staff, as well as haphazard and spotty investigations. Couple with these factors local political pressures, the political impotency of recipients, a deep suspicion of welfare recipients, and the danger of arbitrary governmental action is indeed grave. Contrary to the City's intimations, these facts are not altered by the existence of the new procedure, nor are they in any way alleviated by the opportunity to write a letter of protest. On this issue alone the decision below is manifestly correct.

II.

Kelly v. _Wyman_ and _Wheeler_ v. _Montgomery_ (No. 634) appear to be in conflict and should be heard together.

New York City seeks to avoid the inescapable answer above by asserting a conflict between the decision below and that in *Wheeler* v. *Montgomery*. Although it is not accurate to say that the New York City procedure found invalid below is similar to or identical with that upheld in *Wheeler*, it is fair to say that the decision of the two three-judge panels cannot be harmonized or reconciled. The court in *Kelly* examined not only New York City's special procedure, but also the procedure obtaining in the rest of the State. It found the latter constitutional only after interpreting it to require:

(a) Notice of the true reasons for the termination, clearly stated.

(b) An opportunity to appear "in person", so that the nature of the charges and the evidence may be revealed, and to produce evidence in rebuttal.

(c) "Where termination of benefits 'depends upon information supplied by a particular person whose reliability or veracity is brought into question by the applicant, confrontation and the right of cross-examination . . .'"

(d) A "decision of the reviewing official . . . based solely on evidence before him which has been made available to the recipient . . . "

(e) A review officer "who has [not] become too deeply involved in a case conscientiously to undertake an impartial review".

The court in *Wheeler* did not undertake such an examination of the California procedure but rather dismissed the complaint in the face of serious objections to the lack of confrontation, cross-examination, apprisal, and impartiality of the hearing officer under the California procedure. On the broad questions involved in both cases—the scope and extent of due process requirements in welfare hearings—the decisions are in conflict. As we said in our *amicus* brief in *Wheeler*, in light of the record developed in *Kelly* for resolution of these constitutional questions and the inescapable effect of this Court's holding in *Wheeler* on the decision in *Kelly*, these cases should be heard together. On that basis, Appellees herein do not oppose this Court's noting probable jurisdiction.

CONCLUSION

Appellees' motion to affirm should be granted or, in the alternative, probable jurisdiction should be noted and the case set down to be heard along with *Wheeler* v. *Montgomery*, No. 634.

Respectfully submitted,

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